Neutral Citation Number: [2020] EWCA Civ 16

Case No: B4/2019/2877

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT MANCHESTER
HHJ Wallwork
MA09019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2020

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE LEGGATT
and
LORD JUSTICE ARNOLD

- -

W (A Child: Leave to Oppose Adoption)

- -

Michael Jones (instructed by **WTB Solicitors**) for the **Appellant Child by his Children's Guardian**
Danish Ameen (instructed by **Manchester City Council**) for the **Respondent Local Authority**
Lukhvinder Kaur (instructed by **Bromleys Solicitors LLP**) for the **Respondent Father**
Soria Kajue (instructed by **KHF Solicitors Ltd**) for the **Respondent Mother**

Hearing date: 16 January 2020

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Approved Judgment

Lord Justice Peter Jackson:

1. B, a boy now aged 2 years 9 months, was removed from his parents' care in April 2017 when he was two days old. In March 2018 he was made subject to a placement order. In November 2018 he was placed with prospective adopters and in April 2019 they applied to adopt him. The parents, who have had no contact since October 2018, asked for leave to oppose the making of an adoption order. On 1 November 2019, their application was refused. B's Children's Guardian now appeals from that refusal. The parents (naturally) support the appeal; the local authority opposes it.

2. I will first set out the legal context for decisions of this kind before turning to consider the judge's decision and the grounds of appeal.

The legal context

3. The legal institution of adoption dates back to the Adoption of Children Act 1926. After several legislative iterations, the process is now governed by the Adoption and Children Act 2002 (ACA 2002). The number of adoptions, having peaked at around 25,000 in 1968, is now much smaller: 3,570 children looked after by local authorities were adopted during the year ending 31 March 2019.

4. The ACA 2002 brought about significant changes of principle and practice. One of these concerned the process by which parental objections to adoption are considered. Previously, the question of whether parental consent should be dispensed with was decided at the adoption hearing, the main basis for dispensation being that consent was being unreasonably withheld. In many cases, this process artificially pitted prospective adopters and parents against each other and led to hearings at which the focus was rather on the parents than the child and at which the preservation of the confidentiality of the adoptive placement was a particular concern. The ACA 2002 changed the main basis for dispensing with consent by linking it explicitly to welfare and it decoupled the decision about parental consent from the decision about adoption, enabling the court to decide the former at an earlier stage in the process. The result is that by the time the adoption application comes to be heard it is hardly ever formally opposed.

5. This outcome is achieved by the provisions concerning placement orders (ss. 21 and 52 ACA 2002) combined with those concerning adoption orders (ss. 46 and 47). Section 21 provides for placement orders, which authorise a local authority to place a child for adoption with any prospective adopters it may choose. By s. 21(3) and s. 52(1)(b) the court may only make a placement order if in the case of each parent or guardian of the child who does not consent it is satisfied that the welfare of the child requires the consent to be dispensed with.

6. Section 46, which gives the power to make an adoption order, is subject to s. 47, which provides conditions that must be met before an order can be made. The relevant condition here is s. 47(4), which together with ss. (5) reads:

> "(4)The second condition is that—

> (a) the child has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made,
>
> (b) either—
>
> (i) the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old, or
>
> (ii) the child was placed for adoption under a placement order, and
>
> (c) no parent or guardian opposes the making of the adoption order.
>
> (5) A parent or guardian may not oppose the making of an adoption order under the second condition without the court's leave.
>
> (6) …
>
> (7) The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made."

Accordingly, the parent of a child who has been placed for adoption under a placement order can only oppose the making of an adoption order with the leave of the court, granted in accordance with ss. (7).

7. Finally so far as legislation is concerned, the decision about whether to make an adoption order is one to which the general considerations contained in s. 1 will apply. These include the core provisions of welfare paramountcy throughout life, the delay principle and the welfare checklist, which provides that:

> "(4) The court or adoption agency must have regard to the following matters (among others)—
>
> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
>
> (b) the child's particular needs,
>
> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
>
> (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

> (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—
>
> (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
>
> (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
>
> (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child."

The abilities and perspective of parents therefore remains a consideration for the court considering an adoption application, regardless of whether leave to oppose has been given.

8. The proper approach to the exercise of the power under s. 47(5) has been settled by the decisions of this court in *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616; [2007] 2 FLR 1069 and *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146; [2014] 1 FLR 1035.

9. *Re P* established that an application for leave to oppose adoption proceedings involves a two-stage process. First, the court has to be satisfied that there has been a change of circumstances of a sufficient nature and degree. Only if there has been such change will the court have a discretion to permit the parents to defend the proceedings, the child's lifelong welfare being the paramount consideration in that decision. As to the first stage, as Wall LJ put it:

> "32. We do, however, take the view that the test should not be set too high, because, as this case demonstrates, parents in the position of S's parents should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change in circumstances must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application."

10. *Re B-S* contains a number of relevant observations about s. 47(5) leave applications. The first concerns the effect of leave being granted:

> "13. So one can see the crucial effect of a parent being given leave to oppose under section 47(5): not merely is the parent able to oppose the making of an adoption order, but the parent,

> notwithstanding the making of the earlier placement order, is entitled to have the question of whether parental consent should be dispensed with considered afresh and, crucially, considered in the light of current circumstances (which may, as in the present case, be astonishingly different from those when the placement order was made)."

11. Next, the court explained the nature of the evaluation at the second stage:

> "59. … In deciding how discretion is to be exercised at the second stage the court must have regard to the parent's ultimate prospects of success if leave to oppose is given. In deciding how discretion is to be exercised the child's welfare is paramount; that being so one can well see why the parent's prospects must be more than just fanciful and must be solid – for how otherwise can it be consistent with the child's welfare to allow matters to be reopened?"

12. Then come these observations about the overall approach:

> "70. Section 47(5) is intended to afford a parent in an appropriate case a meaningful remedy – and a remedy, we stress, that may enure for the benefit not merely of the parent but also of the child. …
>
> 71. Parliament intended section 47(5) to provide a real remedy. Unthinking reliance upon the concept of the "exceptionally rare" runs the risk – a very real and wholly unacceptable risk – of rendering section 47(5) nugatory and its protections illusory. Except in the fairly unusual case where section 47(4)(b)(i) applies, a parent applying under section 47(5) will always, by definition, be faced with the twin realities that the court has made both a care order and a placement order and that the child is now living with the prospective adopter. But, unless section 47(5) is to be robbed of all practical efficacy, none of those facts, even in combination, can of themselves justify the refusal of leave."

13. The court then gave the following important guidance, which I set out in full:

> "<u>Section 47(5) of the 2002 Act – the proper approach</u>
>
> 72. Subject only to one point which does not affect the substance, the law, in our judgment, was correctly set out by Wall LJ in *Re P*, though we fear it may on occasions have been applied too narrowly and indeed too harshly. The only qualification is that the exercise at the second stage is more appropriately described as one of judicial *evaluation* rather than as one involving mere *discretion*.

73. There is a two stage process. The court has to ask itself two questions: Has there been a change in circumstances? If so, should leave to oppose be given? In relation to the first question we think it unnecessary and undesirable to add anything to what Wall LJ said.

74. In relation to the second question – If there has been a change in circumstances, should leave to oppose be given? – the court will, of course, need to consider all the circumstances. The court will in particular have to consider two inter-related questions: one, the parent's ultimate prospect of success if given leave to oppose; the other, the impact on the child if the parent is, or is not, given leave to oppose, always remembering, of course, that at this stage the child's welfare is paramount. In relation to the evaluation, the weighing and balancing, of these factors we make the following points:

i) Prospect of success here relates to the prospect of resisting the making of an adoption order, *not*, we emphasise, the prospect of ultimately having the child restored to the parent's care.

ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.

iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of *Re B*, in particular that adoption is the "last resort" and only permissible if "nothing else will do" and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible. That said, the child's welfare is paramount.

iv) At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account *all* the negatives and the positives, *all* the pros and cons, of *each* of the two options, that is, either giving or refusing the parent leave to oppose. Here again, as elsewhere, the use of Thorpe LJ's 'balance sheet' is to be encouraged.

v) This close focus on the circumstances requires that the court has proper evidence. But this does not mean that judges will

always need to hear oral evidence and cross-examination before coming to a conclusion. Sometimes, though we suspect not very often, the judge will be assisted by oral evidence. Typically, however, an application for leave under section 47(5) can fairly and should appropriately be dealt with on the basis of written evidence and submissions: see *Re P* paras 53-54.

vi) As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.

vii) The mere fact that the child has been placed with prospective adopters cannot be determinative, nor can the mere passage of time. On the other hand, the older the child and the longer the child has been placed the greater the adverse impacts of disturbing the arrangements are likely to be.

viii) The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking far ahead into a very distant future – upwards of eighty or even ninety years. Against this perspective, judges must be careful not to attach undue weight to the short term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham MR said in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129, that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems." That was said in the context of contact but it has a much wider resonance: *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, para 26.

ix) Almost invariably the judge will be pressed with the argument that leave to oppose should be refused, amongst other reasons, because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption application. We do not seek to trivialise an argument which may in some cases have considerable force, particularly perhaps in a case where the child is old enough to have some awareness of what is going on. But judges must be careful not to attach undue weight to the argument. After all, what from the perspective of the proposed adopters was the smoothness of the process which they no doubt anticipated when issuing their application with the assurance of a placement order, will already have been disturbed by the

> unwelcome making of the application for leave to oppose. And the disruptive effects of an order giving a parent leave to oppose can be minimised by firm judicial case management *before* the hearing of the application for leave. If appropriate directions are given, in particular in relation to the expert and other evidence to be adduced on behalf of the parent, *as soon as* the application for leave is issued and *before* the question of leave has been determined, it ought to be possible to direct either that the application for leave is to be listed with the substantive adoption application to follow immediately, whether or not leave is given, or, if that is not feasible, to direct that the substantive application is to be listed, whether or not leave has been given, very shortly after the leave hearing.
>
> x) We urge judges always to bear in mind the wise and humane words of Wall LJ in *Re P*, para 32. We have already quoted them but they bear repetition: "the test should not be set too high, because … parents … should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable."

14. Finally, at [84] the court confirmed that the test on appeal is simply whether the judge's decision was wrong.

15. That being the legal context, I turn to the present appeal.

The background

16. The parents, who are of African origin, are aged 54 in the case of the father and 40 in the case of the mother. They met in 1998 and married in 2000. In 2004, they came to the UK. They have three older children, who were aged 17, 14 and 7 at the time of the judge's decision. The youngest of the three has a severe learning disability. The mother also has two adult sons who were out of control in their teenage years and are now in prison, having been in trouble with the law from a young age.

17. The family history appears from earlier judgments of HHJ Wallwork, given on 19 September 2017 after a fact-finding hearing and 29 March 2018 after a welfare hearing in relation to the applications for care and placement orders.

18. The difficulties that led to proceedings arose from the parents' punitive style of parenting and difficulties in the mother's mental health. Intensive support was offered by the local authority from 2014 onwards. However, matters further deteriorated when the father left in October 2015. The mother, who continued to look after the three children, suffered an acute breakdown. The incident that triggered child protection measures occurred in May 2016 when the eldest child complained to his school that his mother had pressed a knife to his throat; other serious allegations of physical mistreatment by both parents also related to the second child. The three children were removed and placed in foster care. In the same month, the father returned to the family home.

The application for care and placement orders

19. The local authority took proceedings, which, for reasons it is unnecessary to relate, overran so comprehensively that it was not until March 2018 that they were concluded. In the meantime B was born in April 2017 and removed to foster care shortly after his birth. The judge made significant findings of fact adverse to the parents, aptly summarised by Mr Jones, counsel for the Guardian, as involving a cumulative picture of poor emotional parenting and significant physical abuse in the form of over-chastisement. At the welfare stage there were detailed psychological reports in relation to the children and the mother. These explained the children's high level of need, and the mother's difficulties in her mental health, and the effect of that on the children. The judge recorded the parents' limited insight and progress in tackling the problems that had led to the children being removed, and to their partial acceptance of the court's findings about their treatment of the children. At the same time he acknowledged the efforts they had made in attending for both general and specialist parenting support. However, he found that there had been no full acceptance of the traumas that the children had experienced, and he noted a continuing lack of empathy on the mother's part. He therefore found that the children could not return home. Specifically as to B, although the parents could meet his physical needs, he should not be returned to their care while the mother underwent therapy, something the judge considered would be "experimenting with his welfare". A placement order was made in his case and, as I have indicated, B was placed for adoption in November 2018. Contact had ended in the previous month. The eldest two children remained separately in foster care and the third child was provided with a specialist placement. Regular parental contact with those children continued.

Subsequent events

20. In January 2019, the parents pleaded guilty to offences of cruelty and neglect and were sentenced to a community order.

21. After the end of the family proceedings, both parents worked closely with professionals to acknowledge what had gone wrong. The mother undertook and completed cognitive behavioural therapy and her mental health has improved. The parents undertook a three-month parenting course and have shown insight and remorse. All professionals were impressed with the warmth of the family relationships and by the end of 2018 the local authority described the situation as "hugely different". In December 2018, the eldest child returned home, where he has since made excellent progress. The second child also made a successful return in July 2019. The third child remained in a specialist placement but the care plan for her had changed to one of rehabilitation and, as was anticipated at the hearing in November 2019, has since returned home as well.

22. Meantime, adoption proceedings in relation to B were issued in April 2019. The parents, who were unrepresented, wrote to the court and were treated as having made an application for leave to oppose. The local authority resisted their application and expressed deep concern that B's permanent placement had not yet been secured. Unlike his siblings, he has never lived with his parents and has formed a strong and positive attachment with his prospective adopters, with whom he is thriving. He is a very sensitive child who has been required to move from his first carers at the age of 17 months and could not be expected to break another attachment. The local

authority therefore strongly opposed a change in care plan at such a late stage. It initially argued that the s. 47(5) test was not met under either limb, but by August 2019 it acknowledged that the first limb was satisfied by the "stark" changes that had been made.

23. The progress of the application was delayed by the withdrawal of the previous Children's Guardian and the need for a new Guardian to be appointed. Having carried out her inquiries, the new Guardian took a different view to the social worker. She regarded the first stage of the test as easily satisfied. As to welfare, she could not rule out that possibility of B transferring to his parents' care and she advised that further information was needed in the form of expert evidence about B's attachment and ability to transfer. She considered that the prospect of a successful transfer of care was based on solid foundations and was not fanciful. Her analysis also contended that the local authority assessment did not give sufficient weight to the impact on B of the loss of his birth family later in life. The short-term effects of leave to oppose being granted could be contained, given B's young age and through local authority support for the prospective adopters. She recommended that the parents' application should be granted and that updating assessments should be ordered within the adoption proceedings.

The judge's decision

24. The matter came before Judge Wallwork on three occasions: 8 May 2019, 5 August 2019 and 1 November 2019. On the first two occasions he gave directions. At the outset of the last hearing he indicated that he would be likely to require a report in relation to attachment issues before deciding the application, but when the matter came before him later in the day, he took a different view.

25. In his extempore judgment the judge noted these matters:

- B having been removed at birth, has never lived with his natural family and has been in his present placement for 12 months. Family contact ceased over 12 months ago.
- A contested adoption hearing would probably not happen before March or April 2020, by which time B would be aged 3.
- There have been significant commendable changes made by the parents since the placement order which opened the door to a welfare evaluation of their application.
- The Guardian cautioned that the question is whether there is a solid prospect of successfully opposing adoption and that this should not be conflated with the question of rehabilitation. However, here the only real options are rehabilitation or adoption, so it is a binary issue.
- The evidence of the social worker was compelling. As a result of the passage of time and the changes in attachment to carers, a second move would be "a devastating blow emotionally and in every way" for B.

- The return of the eldest two children has been reported to be successful, but the return of the third child would be a tall order. If B were returned to the household his needs might be met but there would be risks and he would not receive the one-to-one care he currently experiences.

26. Concluding this outline of what he described as "the heart of the issue", the judge said this:

> "So that is an outline of the position and the reasons why I come to a conclusion that in this case there is a parallel between the question for determination at this stage and what may be considered at a final hearing, but only in the sense that if one is looking at the solidity of the application then the compelling features of this case, which really do come down to his previous disruption of attachment, and the fact that he is now attached, and the lack of relationship with his natural family. Those three matters lead me to consider that there is in fact no solidity in the prospect of the parents avoiding an adoptive order being made in due course."

27. The judge then considered the history of the family in somewhat more detail, and directed himself in relation to the law. He cited the detailed evidence of the social worker about B's early difficulty in transferring from his first to his second carers. He noted that he had at first considered that further evidence on this issue might be needed, but on reflection he was able to conclude from general experience that the prognosis for a child who is disrupted repeatedly in the early attachment stage is very poor: "Where there are repeated changes of caregiver, the effect on a child of being able to place trust and confidence in the carer is enormous and those are repercussions which continue throughout childhood and often into adulthood."

28. The judgment then concluded in this way:

> "So, in this case, and I will say with a degree of sadness as far as the parents are concerned, I recognise the journey that they have been on. I wish they had been able to undertake it sooner. I realise how much they want to restore their family. I wholly accept their good faith and good intentions, their care for their children that is now being exhibited, the efforts that they are making. But I am concerned that where, in looking at the solidity of their prospects is concerned, the effects on the welfare of B, even bearing in mind, as I say, the benefits of a relationship with natural family, are such that I would fear for his future welfare in the event that there were to be a further disruption to his placement. And so I also, again, repeat that the parents are really now, for the first time, experiencing a reunification with the older children, and it is still a work in progress, it seems to me. It will be some time before there will be any certainty that the rehabilitation of the other three children has been successfully achieved. So, very, very sadly, I come to the conclusion that it would not be right for leave to be given. I would not wish there to be further delay, because it

> does seem to me that the journey that B is on is one where he is coming to a position where he is attaching and that is very important. I see what the parents believe, that they would not want a sudden change. I see that they are open to professional support. I understand all of that. But sadly, for the reasons that I have come to it appears to me that the welfare of B does require that this application be dismissed."

The Grounds of Appeal

29. The Guardian's grounds of appeal are that:

    (1) The judge reached conclusions in relation to the impact of any future placement move upon the child without having adequate evidence upon which to do so.

    (2) The judge was wrong to conclude that the parents' prospects of successfully opposing the making of an adoption order lacked solidity.

    (3) The judge failed to provide adequate reasoning for departing from the recommendations of the Children's Guardian.

30. On 17 December 2019, I granted permission to appeal.

The submissions of the parties

31. Mr Jones argues that if there is a realistic prospect of the parents being able to meet B's needs, this merits proper and thorough consideration. The Guardian is strongly of the view that it is in the child's welfare interests for leave to be granted so that all options can be fully explored with the assistance of expert evidence.

32. The central submission is that the judge reached a conclusion in relation to the degree of harm that would result form a second move that went beyond what the evidence allowed. There was an unresolved conflict of professional advice. The social worker considered that B's unsettled behaviour following his second move was possibly a reaction to the change of attachment. The Guardian's report contained this passage:

> "'Research suggests that children who have formed good patterns of attachment can go on to do so again with sensitive introductions and at a pace appropriate to their needs if they need to move. The older the child's age and the better their understanding the harder that becomes. A child of B's age would generally be considered able to re-form attachments such as from his foster carer to adoption but there is less research and information available when considering the impact on children if they are returned to their birth family as it is very unusual for this to occur.
>
> Therefore, in my view there is much information missing within the updating social work statement about the attachments of B, how he fits into his adoptive family and whether if necessary how and if, he could be successfully

> moved or whether he should not be moved and should only be adopted."

Mr Jones argues that the judge, having at first identified the need for further evidence, went on to deal with this issue without the specific evidence that was needed: that was a flawed approach and it underpinned what he described as the compelling features that led him to conclude that the parents' case lacked solidity. In support of this submission, he relies upon a passage from *Re W (A Child)* [2016] EWCA Civ 793. In that case a child had been placed in foster care at birth and with prospective adopters at 7 months old. After the birth of a second child to the mother, the maternal grandparents became aware of the birth of their first child and expressed the wish to care for her as well as the second child. They were given permission to apply for a special guardianship order, and that application was heard together with the adoption application. There was a conflict of professional advice as to what outcome was best for the child. The judge made a special guardianship order to the grandparents. The prospective adopters successfully appealed and the matter was remitted for rehearing. The main judgment of this court, given by McFarlane LJ, considers the approach to be taken once a child has become fully settled in a prospective adoptive home and, late in the day, a viable family placement is identified. Of relevance to the present case, he said this:

> "66. In a case such as the present, where the relationship that the child has established with new carers is at the core of one side of the balancing exercise, and where the question of what harm, if any, the child may suffer if that relationship is now broken must be considered. The court will almost invariably require some expert evidence of the strength of the attachment that exists between the particular child and the particular carers and the likely emotional and psychological consequences of ending it. In that regard, the generalised evidence of the ISW and the Guardian, which did not involve any assessment of [the child] and [the prospective adopters], in my view fell short of what is required."

33. As to the second ground of appeal (solidity of prospects), Mr Jones argues that the judge minimised the importance of the birth tie on the basis that B had never lived with his family and that contact had not taken place for a long time. He was wrong to regard this as a feature that diminished the solidity of the parents' case.

34. Finally, it is said that the judge did not give any real reason for preferring the social worker's view to that of the Guardian.

35. Submissions made on behalf of the parents endorse those made by Mr Jones.

36. In response, Mr Ameen for the local authority invites us to dismiss the appeal. He acknowledges that in these circumstances the judge might have granted leave to the parents but submits that he was entitled to refuse it. The judge had very close knowledge of the case and adequately set out his reasoning. No party had asked for the hearing to be adjourned.

37. It is accepted that there is no evidence about the likely effect of a further move on B and, if leave had been granted, the local authority recognises the force behind the Guardian's view that expert evidence on this point might be necessary. However, the case can be distinguished from *Re W* as there was information about the effect on B of the first change of placement. The judge was entitled to consider the available evidence to be sufficient for his decision and to rule out the parents as potential carers.

38. The local authority accepted that the parents had made significant changes, and that this was intertwined with the prospects of success. But the evidence relating to the older children did not necessarily lead to the conclusion that B could be placed in the parents' care and/or that the making of an adoption order could be successfully challenged. Nor is there any substance in the submission that the judge minimised the importance of the birth tie: in the course of his judgment he specifically noted the loss of relationship to family.

39. The judgment as a whole gave adequate reasons for departing from the Guardian's recommendations.

Analysis and decision

40. The guiding principles for the exercise of the court's power to grant leave to oppose an adoption application are clearly set out in the authorities to which I have referred. The essence of the court's task when considering an application for leave to oppose is to decide whether in all the circumstances it is in the child's interests for fresh and up-to-date consideration to be given to the question of whether parental consent to adoption should be dispensed with: see *Re B-S* at [13]. The statutory scheme is designed to ensure that when the court hears an adoption application it does not have to return to issues that were determined when the placement order was made, thereby causing delay and hindering the finalisation of plans for the child's future. Leave to oppose can therefore only be granted on welfare grounds if two hurdles have first been cleared: change of circumstances and prospects of success. Where there has been no sufficient change, the statutory answer to the welfare question is a clear 'no'. Where there is no solid prospect of anything other than an adoption order being made, the answer will similarly be 'no'. There may then be other reasons connected to the child's welfare that might lead the court to refuse leave: for example, where the existence of contested proceedings would have a harmfully destabilising effect upon the child or the placement. However, there will be cases where there has been sufficient positive change, where there are solid grounds for opposing adoption, and where there are no overriding welfare considerations to prevent leave being granted. It is for those cases, however few, that s. 47(5) exists.

41. A decision about whether to grant leave under s. 47(5) should be taken promptly once the adoption application has been issued and the parents have indicated a wish to oppose. It requires 'proper evidence' (*Re B-S* at [74(iv-v)]), but that should be gathered with a degree of determination that reflects the fact that critical time is passing for a young child awaiting a final decision about his or her future. The decision can usually be made on the basis of written evidence. Even allowing for factors beyond the court's control (particularly the need for a change of Guardian), the six months that it took to decide this application was on any view far too long, particularly when set alongside previous proceedings that had lasted for a year in B's case and two years in the case of his siblings.

42. It is well-established that where substantial change has taken place, the likelihood of the parents being able to show a solid case for opposing adoption will be the greater. To be solid the case must have substance: see *Re B-S* at [57-59]. It must be a case that needs to be fully considered before a decision can be taken about adoption. This calls for a broad and practical balancing up of the welfare advantages and disadvantages of granting leave. I would not expect expert evidence or oral evidence to feature: indeed, if the court is seriously thinking that either might be necessary, it may be an indication that leave should be granted. At all events, the decision on the grant of leave under s. 47(5) should not be allowed to develop into a trial of the adoption application on incomplete evidence.

43. With those observations, I turn to the present appeal. I approach it on the basis that the judge, who had been concerned with decision-making about this child since birth, was well aware of the legal framework for his decision. It is also important to acknowledge that where there is more than one proper outcome, this court cannot substitute its own assessment for that of the judge.

44. I have nonetheless come to the conclusion that the judge's decision was wrong for these reasons:

    (1) To rule out the possibility of a birth family placement for B, even at this late stage, was premature. The decision depended on a view of attachment that was not agreed as between the social work witnesses or supported by expert evidence. This was a case where all the evidence, including expert evidence about the emotional and psychological effect on B of a further move, needed to be fully considered. Nothing less than that could adequately resolve the professional disagreement in this case. The firm stance taken by the Guardian and his own initial instinct that expert evidence may be needed should have alerted the judge to the fact that the parents' opposition to B's adoption needed to be fully considered.

    (2) By excluding the possibility of B being cared for by his parents the judge was inevitably prevented from weighing up all the matters that are likely to be relevant to his lifelong welfare. The factors he found compelling (attachment and lack of a birth family relationship) could not be accurately evaluated on the available evidence. Nor were they the only factors affecting B's welfare, when there was evidence of considerable parental change leading to the return of his siblings to the family home. The fact that a move would carry disadvantages is not in doubt, but it may not be the whole picture. Even if B is to be adopted it is important for him to know in later life that he really could not have been cared for by his parents.

    (3) The negative aspects of a contested adoption hearing must always be taken into account, but in the absence of specific disadvantages, they cannot in themselves be given much weight. Nor, despite the judge's understandable concerns, can further short-term delay be very influential when seen alongside the lifelong significance of the decision about adoption.

45. For these reasons, we informed the parties at the end of the hearing that the appeal would be allowed and that the judge's order would be set aside. There being no purpose in the matter being remitted, we granted leave to the parents to oppose the

making of an adoption order and remitted the adoption application for an urgent case management hearing before the Designated Family Judge so that directions can be given for the gathering of the necessary evidence and the listing of the adoption application for an early final hearing.

46. It scarcely needs to be said that our decision can have no bearing whatever on the outcome of the adoption proceedings themselves.

Lord Justice Arnold

47. I agree.

Lord Justice Leggatt

48. I also agree.